RAJALI YIHIE A

v.

CHUNG KWOK KIONG & ORS

HIGH COURT SABAH & SARAWAK, KUCHING B
RAVINTHRAN PARAMAGURU JC
[CASE NO: SA-12B-1-2011]
16 FEBRUARY 2012

DAMAGES: *Appeal - Road accident - Personal injuries - Death of wife - Appeal against award made - Loss of future earnings - Loss of ability to earn income - Loss of contribution to family expenses - Whether awards by Sessions Court justified - Method adopted by court in averaging monthly income to arrive at losses of pre-trial and future earnings - Whether reliable - Normal range for residual injury - Whether award for losses of personal belonging justified - Whether award to hire domestic helper reasonable - Assessment of loss of contribution to family expenses - Whether deceased's personal living expenses deducted - Civil Law Act 1956 s. 28A(2)(c)* C D

The present appeal arose from the decision of the Sessions Court pertaining to a road accident between the respondents and the appellant. The first respondent and his 12 year-old daughter survived the road accident with injuries but the tragedy cost the lives of the first respondent's wife and son. As a result of the serious injuries suffered, the first respondent's physical movements were restricted and this affected his daily job as a mechanic as he could no longer perform heavy tasks. Medical experts also opined that the first respondent would develop osteoarthritis ('residual injury') due to displaced fractured calcaneum ('principal injury'). Hence, the respondents claimed against the appellant, *inter alia*, for the expenses of hiring a domestic helper to assist in looking after his young daughter until she reaches the age of 20 years. The first respondent further testified that with the death of his wife, he was deprived of RM800 per month in family expenses, a contribution from the deceased through her earnings as a cake seller. The Sessions Court awarded the respondents: (i) RM87,840 and RM285,480 for the losses of pre-trial and future earnings based on multiplicand of RM3,660 per month; (ii) RM23,000 for the residual injury; (iii) RM6,890 and RM4313 for the losses of personal belongings of the first respondent and his deceased wife, respectively; (iv) RM550 a month for a period of eight years for E F G H I

A the costs of hiring a domestic helper; and (v) RM91,200 for the loss of support of the first respondent's wife based on her contribution of RM800 a month. In the present appeal, the appellant appealed against the aforementioned awards, submitting that (i) the method adopted by the court in averaging the first
B respondent's monthly income was unreliable; (ii) the award given to the first respondent for the residual injury was not within the normal range for osteoarthritis; (iii) the losses of personal belonging were never mentioned in the police report nor was it pleaded in the statement of claim; (iv) since the domestic helper was not
C called as a witness, the first respondent had failed to prove that he had actually hired one; and (v) the assessment of the loss of the first respondent's wife's contribution was not fair as her personal living expenses were not deducted.

D **Held (affirming decision of the Sessions Court with variation):**

(1) The learned Sessions Court judge did not commit an error of law in averaging the payments to arrive at the monthly income
E of RM3,660. Section 28A(2)(c) of the Civil Law Act 1956 provides that the amount to be deducted from the average monthly salary must be "proved" or "admitted" living expenses. On the facts, the first respondent did not refer to his living expenses on meals, transport or clothes if he was able to work
F and therefore, did not admit any amount as living expenses. Counsel for the appellant could have put to him that he would have incurred some living expenses if he had continued working as a mechanic but not a single question on this issue was put to him. (para 4)

G **(2)** The memorandum of appeal also did not cite the failure of the Sessions Court to deduct living expenses as a ground of appeal and hence, the appellant should not be allowed to raise the issue. (paras 3, 4, 5 & 6)

H **(3)** The award for osteoarthritis is usually amalgamated with the award for the principal injury. In the instant case the award for the principal injury itself was only RM27,000 but the award for the residual injury was RM23,000. This award was excessive and justified appellate interference. As the first
I respondent suffered heel bone fracture on both feet, the award of RM23,000 was varied to RM10,000. (para 10)

(4) The decision of the Sessions Court to award damages for the loss of the gold items should not be disturbed. Although the loss of gold items were not specifically pleaded in the statement of claim, the appellant was aware of the claim as the receipts for the purchase of the gold items were produced during the discovery stage. Counsel did not object when evidence was given during the trial on the loss of the gold items and proceeded to cross-examine the first respondent about it. It must be taken then that the appellant had waived the right to object to the unpleaded evidence. (para 7)

(5) The first respondent was never challenged during cross-examination that he had to hire domestic helper. Therefore, it would not be proper to take the issue of domestic helper at the appeal stage. Given the rising costs of living, RM550 a month to hire a domestic helper appeared to be reasonable. However, the order was varied to the effect that it should only be until the age of majority which is 18 years. (para 12)

(6) The appellate court could not interfere with the award of loss of financial contribution by the first respondent's deceased wife. Firstly, the Sessions Court judge made a finding of fact on unchallenged evidence that the deceased wife earned RM1,120 as a cake seller. Secondly, the then counsel for the appellant did not challenge the evidence of the first respondent that his wife contributed RM800. Instead, during cross-examination, she asked for confirmation of that claim. Thirdly, the ground of appeal that the Sessions Court judge failed to deduct living expenses was not raised in the memorandum of appeal. (para 13)

Case(s) referred to:

A Mahendran Dr Arasaratnamn v. Voon Shiau Teng [2011] 2 PIR [40] ***(refd)***

Abdul Ghani Hamid v. Abdul Jabbar & Anor [1995] 4 CLJ 317 HC ***(refd)***

Abdul Ramzi Abdul Mahdi v. Nor Abizah @ Christine Tadine [2007] 1 PIR [39] ***(refd)***

Aspalela Abu Samah v. Zulkifli Abdul Rani [2011] 2 PIR [29] ***(refd)***

Faizul Salleh & Another v. Lim Kooi Seng & Another [2011] 2 PIR [31] ***(refd)***

Karim Tompang & Anor v. Ahmad Saiful Hairi Mohamad [2007] 1 PIR [33] ***(refd)***

Masli Amir v. Awang Abbas Asan & Another (53-131-2005-II) (Unreported) ***(refd)***

Raja Zainal Abidin Bj Raja Hassim v. Tan Boon Yam t/a Hup Heng [2011] 1 PIR [22] ***(refd)***
Sadan Pendek v. Koperasi Kenderaan Pahang Timur Berhad [2007] 1 PIR [24] ***(refd)***
Yap King Seng v. Surender Singh Kretar Singh [2011] 1 PIR [39] ***(refd)***
Zulkifle Mohd Noor v. Noordin Ahmad [2011] 2 PIR [15] ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(c)

For the appellant - Wendy Loh (Allan Lao with her); M/s David Allan, Sagah & Teng Advocates
For the respondents - June Chan; M/s Liew Advocates

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is an appeal against the decision of the Sessions Court in a personal injury case. The case arose out of a tragic accident that befell a family on 24 January 2009 when the car they were travelling in was involved in a collision with the car driven by the appellant. The first respondent's wife and his four year old son died in the accident. The first respondent himself suffered serious injuries. His daughter escaped with relatively minor injuries. The appellant admitted 100% liability at the outset and the trial proceeded on the issue of quantum only.

Grounds of Appeal

[2] The appellant did not appeal against all items of damages that were awarded to the respondents. The appeal is confined to the following items only:

(i) The pre-trial and future loss of earnings awarded to the first respondent.

(ii) Damages for loss of personal belongings of the first respondent and the second respondent.

(iii) The award of RM23,000 for the osteoarthritis changes of the subtalar joint (subtalar arthritis) that the first respondent suffered.

(iv) The award of RM550 a month for hiring a maid to help look after the first respondent's daughter until she attains the age of 20 years.

(v) The loss of support of RM91,200 awarded to the first respondent for being deprived of the contribution of his wife at RM800 a month.

The Pre-trial And Future Loss Of Earnings Awarded To The First Respondent

[3] The learned Sessions Court Judge awarded the first respondent pre-trial and future loss of earnings of RM87,840 and RM285,480 by using the multiplicand of RM3,660. The first respondent suffered serious injuries to his heels. He was on a wheelchair for six months after the accident. He will suffer the residual injuries for the rest of his life. He cannot walk on plain ground for more than ten minutes. He cannot run or squat. He has difficulty going up and down the stairs. The first respondent worked as a mechanic prior to the accident. He said that his work involved carrying heavy engines, standing and squatting for long periods of time. He also suffers from weakness to his shoulders. The learned Sessions Court Judge accepted his evidence that he could not continue working as a mechanic any more as his physical movements are limited. The first respondent was educated up to Form three only and has been a mechanic all his life. He possesses no other job skills and has been unemployed since the accident. For this reason, the Sessions Court awarded him loss of pre-trial and future loss of earnings based on the multiplicand of RM3,660 per month. The appellant is not appealing the decision to award future loss of earnings. He is only attacking the multiplicand used to calculate the pre-trial and future loss of earnings. The first respondent was not earning a fixed monthly wage. He worked on a contract basis with Sally Motors Trading. He gave evidence of his earnings for the four month period prior to the accident. He tendered five payment vouchers that he received during that period. This was considered by the learned Sessions Court Judge to ascertain his average monthly income. The Sessions Court Judge ascertained that the average earnings was RM3,660 per month. This was challenged by counsel for the appellant on a number of grounds. Firstly, counsel for the appellant questioned whether the first respondent was employed

on a contract basis according to the repairs that he performed on assigned vehicles. He suggested that the first respondent was not employed on a full time basis. This ground must be rejected as the employer of the first respondent was called to testify in court and he confirmed that the employment was on a contract basis. Counsel for the appellant also referred to the payment vouchers which vary from RM819 to RM5,028. Counsel for the appellant argued that the method of averaging the amounts in the payment vouchers is not reliable as the earlier payment vouchers were not tendered. He suggested that the average income derived from the said payment vouchers is an exaggeration.

[4] In my opinion, it is too late to raise this issue at the appellate stage. The record of appeal shows that the cross-examination of the first respondent was quite brief. The then counsel for the appellant only put to the first respondent that his salary varied from month to month. She did not put to the first respondent that the payment vouchers in question is an exaggeration or that the average income derived from it is not reflective of his earnings. She also did not put to the respondent that he had colluded with his employer to present the payment vouchers in question. The learned Sessions Court Judge accepted the evidence of the first respondent and his employer that the payment vouchers represented his salary for the four months period. In the premises, in my opinion, the learned Sessions Court Judge did not commit an error of law in averaging the payments to arrive at the monthly income which is only RM3,660. Counsel for the appellant also alleged that tax and EPF deductions were not taken into account. As submitted by counsel for the respondent, there is no merit in these grounds. The first respondent did not tender any evidence whether he was in the taxable bracket and counsel for appellant did not bother to cross-examine him on this point. In the premises, it is not proper to raise this point at the appellate stage. The only remaining issue is whether "living expenses" ought to have been deducted from the average monthly income of RM3,660. Section 28A(2)(c) provides as follows:

> … in awarding damages for loss of future earnings the Court shall take into account:
>
> (i) ….
>
> (ii)

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;

[5] The present counsel for the appellant is certainly correct to submit that the first respondent would have incurred expenses on meals and transport had he gone to work. He was also correct to submit that these expenses should be deducted from the average monthly salary before arriving at the correct multiplicand. However, the above cited section provides that the amount that must be deducted is the "proved" or "admitted" living expenses of the plaintiff. In this case, the first respondent did not refer to his living expenses on meals, transport or clothes if he was able to go to work. Therefore, he did not admit to any amount as living expenses. Counsel for the appellant could have put to him that he would have incurred some living expenses if he had continued working as a mechanic. However, not a single question on this issue was put to him. This is exactly what happened in the case of *Abdul Ghani Hamid v. Abdul Nasir Abdul Jabbar & Anor* [1995] 4 CLJ 317 where the counsel for the defendant failed to cross-examine the plaintiff on his living expenses and Abdul Malik Ishak J had this to say on the effect of such failure:

> On the strength of s. 28A(2)(c)(iii) of the Civil Law Act 1956, it was argued that there was a diminution of RM400 per month as the living expenses of the plaintiff. Unfortunately, there was no cross-examination of the plaintiff on this point. Gani, however, was emphatic that the plaintiff did not have a transport of his own and he did not go out to the theatre nor have a specific hobby. We even have evidence that on the date of the accident Ridzuan gave RM50 to the plaintiff to take his lunch with Rosli and Zakaria. With hardly any evidence of diminution, I am constrained not to agree with the defendant's counsel. I am aware that s. 28A(2)(c)(iii) of the Civil Law Act 1956 is intended to apply to a living plaintiff (*Chang Chong Foo & Anor v. Shivanathan* [1992] 2 MLJ 473 (SC). It is only logical that some part of the plaintiff's earnings must have been devoted to his own maintenance. But no matter how logical it may appear to be, it can only be deducted if the amount is either admitted by the plaintiff or proved by the defendant. Here, there is no admission by the plaintiff nor proved by the defendants and therefore no deduction would be made from the plaintiff's income (*Marappan v. Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99)

[6] Another relevant point to note is that the Memorandum of Appeal does not cite the failure of the Sessions Court to deduct "living expenses" as a ground of appeal. The only challenge is the finding of the Sessions Court Judge that the first respondent earned RM3,600 per month. I have also referred to the submission of counsel for the appellant in the lower court (at p. 227 of the record of appeal). Counsel for the appellant did not raise the issue of deduction of living expenses. She only submitted that the monthly income of the first respondent should be assessed at RM2,500. Therefore, counsel for the appellant should not be allowed to raise this issue at the appellate stage. In so far as mitigation of damages is concerned, the learned Sessions Court Judge made a finding of fact that the first respondent was unable to continue employment as a mechanic and that he was only qualified to do that job due to his education level. The appellant did not plead mitigation of damages or challenge the first respondent that he could find some other suitable alternative employment. In the premises, interference with the award of pre-trial and future loss of earnings is unwarranted.

Damages For Loss Of Personal Belongings Of The First Respondent And The Second Respondent

[7] The Sessions Court awarded RM6,890 for the loss of the gold ring that was allegedly worn by the first respondent during the accident. A sum of RM4,313 was also awarded for the loss of gold jewellery alleged by worn by the deceased wife of the first respondent. This award has been attacked by counsel for the appellant for the following reasons. Firstly, the loss of the gold items was not mentioned in the police report lodged by the first respondent. Secondly, the loss of these items was not pleaded in the statement of claim. Only RM500 was pleaded for loss of personal effects. In my opinion, the decision of the Sessions Court to award damages for the loss of the gold items should not be disturbed for the following reasons. It is true that the loss of the gold items were not specifically pleaded in the statement of claim. However, the appellant was aware of the claim as the receipts for the purchase of the gold items were produced during the discovery stage. When evidence was given during the trial on the loss of the gold items, counsel for the appellant did not object to the evidence. In fact, she proceeded to cross-examine the first respondent about the loss of the gold items without once taking a point of pleading on the evidence. In the premises, it must be taken that the appellant had waived the right to object to the

unpleaded evidence. (see *Abdul Ramzi Abdul Mahdi v. Nor Abizah @ Christine Tadine* [2007] 1 PIR [39]). As to the question whether the gold items were lost during accident, learned counsel for the appellant cross-examined and challenged the first respondent. The first respondent told the court that the gold items were worn by him and his late wife because it was the custom to wear them during the Chinese New Year period. The learned Sessions Court Judge made a finding of fact that the first respondent could claim for this loss. In the premises, an appellate court should be slow to overturn the finding of fact of the trial judge who had seen and heard the witness unless it is demonstrated that his appreciation of the evidence is palpably flawed. I see no reason to come to that conclusion. I shall, therefore, uphold his finding that the gold items were indeed lost during the accident.

Osteoarthritis

[8] The consultant orthopaedic surgeon (Dr Denis Yu) noted that with displaced fractured calcaneum, the first respondent will develop osteoarthritis changes of the subtalar joint. Another consultant orthopaedic surgeon (Dr Oh Woo Guan) explained the ailment as follows during the examination-in-chief:

Q : What do you mean by "subtalar arthritis"?

A : Subtalar joint is the joint formed by articulation of the callus calcaneum (heel bone). Callus means part of the ankle joint.

Q : What is "arthritis"?

A : Post traumatic. Arthritis is a form of inflammation of joint due to injury to the cartilage of the joint. Osteoarthritis is due to wear and tear of natural causes.

[9] Dr Oh also noted in his report that the first respondent had developed arthritis. The learned Sessions Court Judge awarded RM23,000 for this residual ailment based on the unreported Kuching Sessions Court case of *Masli bin Amir v. Awang Abbas bin Asan & Another* (53-131-2005-II). The learned Sessions Court Judge did not give any other reason for this award. Counsel for the appellant submitted that this award is not within the normal range of awards for osteoarthritis. He submitted the following cases reported in the Personal Injury Reports (PIR) last year where only RM5,000 was awarded for osteoarthritis:

(i) *Zulkifle bin Mohd Noor v. Noordin bin Ahmad* [2011] 2 PIR [15];

(ii) *A Mahendran a/l Dr Arasaratnamn v. Voon Shiau Teng* [2011] 2 PIR [40];

(iii) *Raja Zainal Abidin bin Bj Raja Hassim v. Tan Boon Yam t/a Hup Heng* [2011] 1 PIR [22];

(iv) *Yap King Seng v. Surender Singh a/l Kretar Singh* [2011] 1 PIR [39];

(v) *Faizul bin Salleh & Another v. Lim Kooi Seng & Another* [2011] 2 PIR [31];

(vi) *Aspalela bt Abu Samah v. Zulkifli b Abdul Rani* [2011] 2 PIR [29].

[10] During the final arguments before me, learned counsel for the respondents cited two additional cases, ie, *Sadan a/l Pendek v. Koperasi Kenderaan Pahang Timur Berhad* [2007] 1 PIR [24] and *Karim b Tompang & Anor v. Ahmad Saiful Hairi b Mohamad* [2007] 1 PIR [33] where RM20,000 and RM11,000 were awarded for post traumatic secondary osteoarthritis. However, only the synopsis of the judgment is available in those reports. The location or the severity of the principal injury or any special reason that justifies such a high award is not stated. The comparables used in those cases are also not cited. I have looked up a number of reported cases in the Malayan Law Journal and Current Law Journal which were decided at a time when the High Court was still invested with jurisdiction to try personal injury claims. I noted that the award for osteoarthritis is usually amalgamated with the award for the principal injury such as the fracture of the bone or cartilage at the joint. Dr Oh testified that osteoarthritis is due to wear and tear of natural causes but secondary arthritis or post traumatic arthritis is caused by injury to the joint. Perhaps this is the reason in the past, courts usually took into account the secondary arthritis when assessing damages in respect of injury to the joint. Now a days, the lower courts sometimes assess damages for osteoarthritis separately. However, as submitted by counsel for the appellant, who diligently cited half a dozen cases from the Personal Injury Report (PIR) for 2011, the normal range is around RM5,000. In the instant case, the award for the principal injury itself, ie, the fracture of the heel bone is only RM27,000. However, the award for the residual injury, ie, the secondary arthritis is RM23,000. For the reasons given above, this award is

excessive and justifies appellate interference. As the first respondent suffered heel bone fracture on both feet, I vary the award of RM23,000 to RM10,000 as suggested by counsel for the appellant.

Costs Of Hiring A Domestic Helper

[11] At the time of the accident, the daughter of the first respondent was 12 years old. The wife and son of the first respondent succumbed to their injuries. The first respondent had been so seriously injured that his movements have become limited. He is unable to walk for more than ten minutes at a stretch and cannot carry heavy objects. He is also unable to squat. It is for this reason that he made a claim for the expenses of hiring a domestic helper to assist in looking after his 12 year old daughter until she reaches the age of 20 years. The learned Sessions Court Judge awarded RM550 a month for a period of eight years. The ground of challenge to this award is that the first respondent failed to prove that he had hired a domestic helper. The reason for this submission is that the domestic helper was not called as a witness. However, the learned trial judge accepted the evidence of the first respondent that he had to hire a domestic helper because he had lost the services of his wife to help look after his daughter. The first respondent said in his witness statement as follows:

Q : Prior to the collision, who looked after the children while both of you were at work?

A : My late wife was primarily the one taking care of the children, their education and upbringing. She was also responsible for doing all our laundry, cooking and general housekeeping.

Q : Who now takes care of your daughter, the laundry, cooking and housekeeping?

A : I hired a local maid to do the work which my late wife used to do.

Q : When did you hire a local maid to do these works?

A : End of April or beginning of May 2009.

Q : How much do you pay the maid per month?

A : RM550 per month.

[12] During cross-examination, the first respondent was never challenged that he had to hire a domestic helper to do household chores and help to look after his daughter. Furthermore, counsel for the appellant did not address this point in her submission at the end of the trial before the Sessions Court Judge. In the premises, in my opinion, it would not be proper for the present counsel for the appellant to take up this point at the appeal stage. In respect of the quantum of RM550 a month, the learned Sessions Court Judge accepted the evidence of the first respondent. In any event, given the rising costs of living, RM550 a month to hire a domestic helper appears to be reasonable. However, the learned Sessions Court Judge allowed the expenses of hiring a maid for eight years which is until the daughter of the first respondent attains the age of 20 years. I agree with counsel for appellant that it should only be until the age of majority which is 18 years. I shall, therefore, vary the order to that effect.

Deduction Of Living Expenses From Wife's Contribution

[13] The first respondent testified that his deceased wife earned RM1,120 as a cake seller and that she had contributed RM800 towards the family's expenses. The complaint of the appellant is that the sum of RM800 is not a fair assessment of the wife's contribution and that her personal living expenses were not deducted. In my opinion, the appellate court cannot interfere with the award of the Sessions Court for the following reasons. Firstly, the Sessions Court Judge made a finding of fact on unchallenged evidence that the deceased wife earned RM1,120 as a cake seller. Secondly, the then counsel for the appellant did not challenge the evidence of the first respondent that his wife contributed RM800. Instead, during cross-examination, she asked for confirmation of that claim. The only cross-examination on this point is as follows:

> Q : In respect to your answer to Question No.76, your late wife had contributed RM800 of her monthly earnings for the maintenance and upkeep of your children. The balance was for her own personal use. You still maintain the said answer?
>
> A : Yes. It was true.

[14] Thirdly, in respect of the Sessions Court Judge's failure to deduct living expenses, this ground of appeal was not raised in the memorandum of appeal. The appellant's ground of appeal pertaining to the award on the loss of support is that the amount

of RM800 per month is not reasonable. However, as I noted earlier, there was no cross-examination on the reasonableness of the contribution. In the premises, the finding of the Sessions Court Judge that the deceased wife contributed RM800 a month for expenses must be affirmed.

[15] In conclusion, the judgment of the Sessions Court is affirmed subject to the following variation:

(i) The award for osteoarthritis is reduced from RM23,000 to RM10,000.

(ii) The award of RM500 per month for 20 years for the expense of hiring a maid is reduced to 18 years.

[16] Finally, I shall order costs in favour of the respondents as the judgment of the lower court is being affirmed subject to minor variation. The respondents shall have costs of RM3,000.